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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1064

STOCKTON PORT DISTRICT, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 6–9) is reported at 369 F. 2d 380. The report of the Federal Maritime Commission (Pet. App. 11–50, 58–80) is reported at 9 F.M.C. 12.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1966, and the petition for a writ of certiorari was filed on February 14, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 2350 and 1254(1).

QUESTION PRESENTED

Whether shipping conference agreements and tariff rules which provide for equalization of inland transportation costs on the movement of ocean freight to specified terminal ports are invalid as a matter of law under the anti-discrimination provisions of the Shipping Act, 1916.

STATUTES INVOLVED

Pertinent portions of the Shipping Act, 1916, as amended, the Merchant Marine Act, 1920, as amended, and of other statutes are set forth in the Appendix A to the petition.

STATEMENT

Petitioner is a public corporation which operates the terminal facilities comprising the Port of Stockton, California.[1] It filed a complaint with the Federal Maritime Commission against three conferences of steamship lines and their members,[2] charging that the port equalization rules in their respective tariffs had the effect of diverting cargo from it in violation of Sections 15, 16, 17 and 18(b) of the Shipping Act, 1916, and Section 205 of the Merchant Marine Act, 1936, and in contravention of the principles and policies of Section 8 of the Merchant Marine Act, 1920. The conferences and the San Francisco Port Authority, a State agency which operates the

[1] "Stockton" will be used interchangeably to refer, as the context may require, to the corporation which operates the terminal facilities at Stockton and to the port itself.

[2] All three conferences—the Pacific Westbound Conference, Pacific Straits Conference and the Pacific/Indonesian Conference—operate pursuant to agreements approved by the Commission, from the Pacific Coast to destinations in the Far East.

Port of San Francisco, intervened and generally opposed petitioner's request that the equalization rules be deleted from the conference tariffs. After full administrative proceedings, the Commission held that the rules are not unlawful insofar as they permit equalization of inland transportation charges from the shipper's point of origin to the several terminal ports[3] in the harbor complex of San Francisco Bay, *i.e.*, the ports located on the waterways served through the Golden Gate (the strait connecting San Francisco Bay and the Pacific Ocean).

Ocean freight rates from all terminal ports on San Francisco Bay and its connecting waterways are the same. However, shippers' total costs from these ports would normally vary because the inland transportation rates to the ports vary according to their distance from the inland point of origin. To equalize inland costs among ports served through the Golden Gate, the conferences adopted "port equalization rules." These rules permit the ocean carrier to reimburse the shipper for the difference between his inland costs of delivering to a port of loading designated by the carrier and his inland costs to the nearest port. Thus a shipment originating at a point near Stockton may be loaded at San Francisco—the port nearest to the Golden Gate—at the same costs to the shipper as if it had been delivered for loading at Stockton, some 75 miles from the Golden Gate via inland waterways.

In concluding that the equalization rules are not unlawful as applied to these ports, the Commission took into account the geographical relationship of

[3] Terminal ports are those designated by the conferences as to which the same ocean rates apply (Pet. App. 13).

these ports to each other and to the origin territory (Pet. App. 23–29) and the over-all impact of the rules upon shippers, carriers and ports. It found that the rules on the whole were to the mutual advantage of shippers and carriers and did not have a significant adverse effect on Stockton. As to the shippers, the Commission found that under the rules, they benefit because they obtain more frequent and reliable ocean freight service at no extra cost. As to the carriers, the Commission found significant efficiencies. It takes a vessel which has voyaged up San Francisco Bay, an additional eight hours to reach Stockton, not counting delays due to fog and bridge liftings. The estimated additional voyage cost per vessel runs between $3,000 and $4,000. The carriers therefore benefit by avoiding the extra 75 mile journey for amounts of cargo insufficient to support regular service (Pet. App. 14, 16, 18). Moreover, petitioner's facilities are such that vessels loading both bulk and general cargo must shift between different berths at an additional cost of about $300 (Pet. App. 18, 35). As to Stockton, the Commission found that, despite equalization, it has had a "phenomenal growth", in fact, actually increasing its proportion of total tonnage to conference destinations while the relative share of other ports in the area was declining (Pet. App. 16, 36–37).

The Commission recognized that elimination of the rules might confer some advantages to Stockton although not to the extent claimed by it (Pet. App. 26–27), and perhaps to certain shippers as well (Pet. App. 19). On a comprehensive appraisal of the total

transportation situation, however, the Commission was of the view that "[t]he equalization under consideration here reflects an overall economic good, tangible benefit to the public at large, and an important transportation justification" (Pet. App. 35).[4]

The court of appeals affirmed *per curiam,* declaring that "the very complete and elaborate decision of the Maritime Commission discloses that its conclusions do have warrant in the record, a reasonable basis in law, and are supported by substantial evidence" (Pet. App. 9).

ARGUMENT

The petition presents no substantial question warranting further review by this Court. There is no conflict between the circuits and the decision below is correct.

The only issue raised by the petition is whether the congressional policy favoring port development and improvement condemns port equalization, or similar practices, which divert *any* cargo from a port through which the cargo would otherwise move (Pet. 7–13).[5] Stockton asserts, in effect, that port equaliza-

[4] However, the Commission held that the equalization rules were unlawful as applied to cargo originating in the area close to the Golden Gate ports but in fact loaded at the ports of Los Angeles or Long Beach, some 400 miles away (Pet. App. 41–44). No review has been sought from the portion of the order disallowing the rules as thus applied (Pet. App. 56–57).

[5] Petitioner has abandoned a number of contentions, advanced below, based upon (a) the unlawful rebate provisions of § 16 (Second) of the Shipping Act, 1916, and (b) the anti-discrimination provisions of §§ 15 and 16 (First) of that Act, and (c) the provision of the Fifth Amendment to the Constitution barring the deprivation of property without due process of law.

tion is *per se* unlawful and that the Commission has no discretion whatever to permit it, even if it finds that equalization, in a given situation, (a) is beneficial to shippers and ocean carriers, (b) affects the complaining port only minimally, (c) is confined to ports in the same harbor complex, and (d) is, on the whole, beneficial to the commerce of the United States and the public interest.

Section 8 of the Merchant Marine Act, 1920, 46 U.S.C. 867 (Pet. App. 2–3), on which petitioner principally relies, contains no suggestion of so rigid a Congressional policy. It directs the Secretary of Commerce in cooperation with the Secretary of the Army "with the object of promoting, encouraging and developing ports and transportation facilities in connection with water commerce * * *, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of commerce;" to investigate also the causes of port congestion, the subject of terminal facilities and "any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports * * *." Thus, it simply provides for a continuous study of port development by responsible government agencies. But it does not establish substantive criteria or impose limitations on the power of the Federal Maritime Commission to determine whether particular practices constitute unjust or unreasonable discrimination under Sections 15 and 16 of the Shipping Act. Nor

does it make the policy of port development paramount to all other interests. On the contrary, under the Shipping Act the Commission must—as it did here—give due weight to all of the transportation factors involved—the interests of shippers and carriers as well as the interests of the ports.

Whether a discrimination is undue or unreasonable is, of course, a question committed to the expert judgment of the agency, based upon an appreciation of all the facts and circumstances affecting the traffic. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297, 303–304. It can scarcely be supposed that by enacting Section 8 of the Merchant Marine Act, 1920, Congress, without saying so, meant to foreclose the Commission from taking into account all the circumstances bearing upon the reasonableness of an alleged port discrimination. Certainly, the language of Section 8 does not require such a result. Nor is there anything in its legislative history (S. Rep. No. 573, 66th Cong., 2d Sess.; H. Rep. No. 443, 66th Cong., 1st Sess.; H. Conf. Rep. No. 1107, 66th Cong., 2d Sess.), which suggests such an intention. Significantly, the Merchant Marine Act, 1920 (41 Stat. 988), repealed a number of provisions of the Shipping Act of 1916[6] and amended a number of others,[7] without a word about the anti-discrimination provisions of Sections 15 and 16. This necessarily implies that the Commission's power and responsibility to take all factors into account in

[6] Sections 5, 7 and 8 (by § 2(a)(5) of the Merchant Marine Act, 1920, 41 Stat. 998).

[7] Sections 3, 4, 9 and 14 (by § 3 (a), (b), 18 and 20 respectively of the Merchant Marine Act, 1920, *id.* at 989, 990, 994, 996).

permitting or condemning conference practices is undiminished.

In regulating carrier practices, of course, the Commission also considers as a relevant factor the policy of encouraging port development reflected in Section 8. It expressly did so in the instant case (Pet. App. 22–29)[8] and has done so over the years in passing upon the attempts of carriers by artificial means to divert cargo from ports through which they would otherwise normally flow. See *e.g., City of Mobile* v. *Baltimore Insular Line, Inc.*, 2 U.S.M.C. 474, 486–487; *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 2 U.S.M.C. 500, 504 and 2 U.S.M.C. 699; *City of Portland* v. *Pacific Westbound Conference*, 4 F.M.B. 664, affirmed *sub nom. Pacific Far East Line* v *United States*, 246 F. 2d 711 (C.A.D.C.); *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 F.M.B. 48, 55–56. Thus it weighed "the economies of transportation," the geographical relationship of the ports inside the Golden Gate to each other and to the originating territory, the impact on petitioner, the deficiencies in petitioner's proposal, and studies made by the government agencies charged with administering Section 8, which indicated that the ports inside the Golden Gate have roughly the same tributary territories. Based upon a consideration of all these factors, it properly concluded that, for the purpose

[8] In fact, the Commission took this policy into account in disallowing the rule which resulted in the diversion to Los Angeles and Long Beach, which are over 400 miles from the Golden Gate, of cargo originating in the area tributary to the ports inside the Golden Gate (Pet. App. 41–42). (See n. 4, p. 5, *supra*.)

of determining the validity of equalization with respect to the originating territory here involved, the ports inside the Golden Gate may properly be treated as serving the same geographical area, and that the policy of Section 8 is not inconsistent with the port equalization practices involved here.

There is no conflict (Pet. 9–10, 12) with *City of Portland* v. *Pacific Westbound Conference*, 4 F.M.B. 664, affirmed *sub nom. Pacific Far East Line* v. *United States*, 246 F. 2d 711 (C.A.D.C.). That case does not hold, as petitioner asserts (Pet. 9–10), that Section 8 of the Merchant Marine Act, 1920, forecloses the Commission's discretion under the Shipping Act. The equalization rules there involved diverted cargo which originated near Portland and Seattle to ports hundreds of miles away in California and the inland transportation cost absorbed by the ocean carrier exceeded 50 percent of the entire ocean rate in some instances. The Commission observed that under the policy of Section 8 it would look with disfavor upon practices which divert cargo from the natural direction of the flow of traffic, "all other factors being substantially equal * * * ." 4 F.M.B. at 679. The court of appeals in that case, like the court in this case, affirmed on the basis of the settled principle that Congress had entrusted the Commission with broad discretion in dealing with problems under the Shipping Act and that there being a rational basis for the Commission's resolution of the problem, it could not substitute its judgment for that of the Commission. *Swayne & Hoyt, Ltd.* v. *United States*,

300 U.S. 297, 303–304; *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 619–621.[9]

There is plainly no basis for petitioner's suggestion that the Commission will hereafter proceed to approve all port equalization rules, regardless of circumstances. Indeed, it did not hesitate in this case to invalidate the equalization rules as applied to Los Angeles and Long Beach, (see n. 4, p. 5, *supra*), which it found to be unreasonable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] As a matter of fact, the court of appeals in the *City of Portland* case, *supra*, expressed doubts as to whether the Commission even need take the policy of Section 8 into account. It said that the Commission "could, if it was not bound to do so, examine the practices * * * in the light of that policy, and exercise its power to approve or disapprove such practices accordingly." 246 F. 2d 711, 716.

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